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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF AITKIN, COUNTY OF BENTON, COUNTY OF SHERBURNE, COUNTY OF CROW WING, COUNTY OF ISANTI, COUNTY OF KANABEC, COUNTY OF MILLE LACS, COUNTY OF MORRISON, COUNTY OF PINE,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, FOND DU LAC BAND, ST. CROIX BAND, LAC DU FLAMBEAU BAND, BAD RIVER BAND, SOKAOGON CHIPPEWA COMMUNITY, RED CLIFF BAND, AND LAC COURTE OREILLES BAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A treaty with the Chippewa in 1837 ceded over 13 million acres of land now in the State of Minnesota. Article 5 temporarily granted a "privilege of hunting, fishing, and gathering the wild rice . . . during the pleasure of the President. . . . " In 1850, President Zachary Taylor issued an Executive Order stating that "the privileges granted temporarily to the Chippewa [describing and quoting] are hereby revoked." A later 1855 Chippewa Treaty ceded additional lands, established separate reservations, and provided the "Indians . . . entirely relinquish and convey . . . all right, title, and interest, of whatsoever nature . . . in, and to any other lands in the territory of Minnesota. . . . " The Eighth Circuit held the 1850 Presidential Order was invalid and that the later 1855 Treaty relinquishment did not extinguish these temporary hunting and fishing rights. The questions presented are:

1. Whether the Eighth Circuit correctly held – in conflict with decisions of this Court – that a Presidential Order may be reviewed and held invalid.

2. Whether the Eighth Circuit correctly held that the 1855 Treaty relinquishment of right, title and interest did not extinguish hunting and fishing rights in the territory.

3. Whether a federal court may decline to apply this Court's "moderate living" doctrine, *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, (hereinafter *Fishing Vessel*), 443 U.S. 658 (1979), and order a maximum of one-half the hunting and fishing be dedicated to Indian Bands' harvest even though the Band has become wealthy as a consequence of casino gambling.

PARTIES TO THE PROCEEDING BELOW

Petitioners, Counties of Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison and Pine, are counties in an area of mid-Minnesota ceded to the United States under Treaty with the Chippewa of 1837 (7 Stat. 536). They were formed shortly after Minnesota statehood in 1858.

The State of Minnesota and officials charged with conservation management and enforcement were the original defendants (collectively "Minnesota"). The "Minnesota Counties" intervened in the district court proceeding.[1]

Respondents and original plaintiff/appellees below are the Mille Lacs Tribe and some members and officers. We refer to them collectively as "Mille Lacs." They were later joined by the United States. The Fond du Lac Band of Minnesota separate case was consolidated.

Later intervenors (after decision in "Phase I") were the six Bands from Wisconsin: St. Croix Chippewa Band, Lac Du Flambeau Band, Bad River Band, Sokaogon Chippewa Community, Red Cliff Band and Lac Courte Oreilles Band. These latter Bands are referred to below as the "Wisconsin Bands."

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[1] After one Panel of the Court of Appeals reversed a district court order to the contrary.

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PETITION FOR A WRIT OF CERTIORARI

The Counties of Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison and Pine (hereinafter "Minnesota Counties") respectfully petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Eighth Circuit in these cases.

OPINIONS AND ORDER BELOW

The opinion of the court of appeals is reported at *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997) and is reproduced in the Appendix[1] ("App."). That opinion affirmed prior decisions of different district court judges in two "phases." The Phase I opinions of the United States District Court for the District of Minnesota are reported at *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118 (D. Minn. 1994) (Judge Diane Murphy) (deciding summary judgment motions), App. 351; *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994) (decision holding Mille Lacs Band's 1837 treaty rights continue), App. 212; *Fond du Lac v. Carlson*, (holding *Mille Lacs* determines same issue for this Band), unreported Mem. Op. and Order of March 18, 1996 (App. 419).

Phase II decisions are *Mille Lacs Band v. Minnesota*, March 29, 1996 Mem. Op. and Order (Judge Michael J.

[1] There are separate petitions; the State of Minnesota filed the Appendix for all petitioners.

Davis), unreported (extending 1837 treaty rights to Wisconsin Bands), App. 164; *Mille Lacs Band of Chippewa Indians v. Minnesota*, summary judgment to all Bands, 952 F. Supp. 1362 (D. Minn. 1997), App. 74.

JURISDICTION

The decision of the Court of Appeals was entered on August 26, 1997 (App. 1). A timely Petition for a rehearing en banc was denied on November 17, 1997 (App. 482) (with Circuit Judges Loken and Wollman voting to grant). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1983).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This case involves these constitutional provisions: U.S. Const. art. II § 2:

> **Powers of the president**. The president shall be commander in chief of the army and navy of the United States, ...
>
> He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; . . . .

The case also involves the following statutes, treaties and Executive Order, which are reprinted verbatim in the Appendix.

Treaty with the Chippewa of 1837 (7 Stat. 536), App. 484, which by cession extinguished the Indian title to this

area. Article 5 temporarily granted a "privilege of hunting, fishing and gathering wild rice . . . during the pleasure of the President." App. 486.

Executive Order of February 6, 1850. President Zachary Taylor issued this Executive Order, a provision of which expressly revoked the 1837 privilege:

> [T]he privileges granted temporarily to the Chippewa Indians . . . by the fifth article of the treaty made with them on the 19th day of July, 1837, "of hunting, fishing and gathering the wild rice, . . . " are hereby revoked.

App. 565.

Treaty with the Chippewa of 1855 (10 Stat. 1165) (App. 502) This Treaty ceded land in other areas and provided separate reservations for the Chippewas. Article I of that treaty provided the following relinquishment:

> And the same Indians do further fully and entirely relinquish and convey to the United States any and all right, title or interest, of whatsoever nature the same may be which they may now have in, and to, any other lands in the Territory of Minnesota or elsewhere.

Id., App. 502.

STATEMENT OF THE CASE

Historical Facts.

The Counties are located in a 13-million acre area of mid-Minnesota ceded to the United States under Treaty with the Chippewa of 1837 (7 Stat. 536)[2]. The treaty also

[2] There were also other ceded lands, now in Wisconsin.

temporarily granted the Bands a "privilege of hunting, fishing and gathering wild rice . . . during the pleasure of the President."

Settlement in the area accelerated, and the continued activities of the Indians led to conflicts with incoming settlers. The district court acknowledged evidence establishing one common problem, Indian killing of settlers' livestock. Settler claims for depredations by the Chippewa – including killing livestock – were exhibits. D 17-21. The Report of the Commissioner of Indian Affairs of August 29, 1846 noted such depredations and that difficulties between Indians and Whites were frequent. Shootings and killings both between groups of Indians and with settlers were also documented (*e.g.*, L.A. 9306-8).[3]

The President received a recommendation that the 1837 privilege be revoked in the 1849 Report of Commissioner of Indian Affairs (S.A.A. 347). A formal Petition from the Minnesota Territorial Legislature to the President and Congress also specifically asked that the "privileges given to them by Article Five of the Treaty . . . be revoked." App. 566.

President Taylor responded to the problems and recommendations on February 6, 1850, by issuing a Presidential Order expressly revoking:

> [T]he privileges granted temporarily to the Chippewa Indians . . . by the fifth article of the treaty made with them on the 19th day of July,

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[3] The record filed in the Circuit Court is designated as L.A. for Landowners' Appendix and S.A.A. for State's Appendix.

> 1837, "of hunting, fishing and gathering the wild rice, . . . *are hereby revoked.*

App. 565, emphasis added.

In 1855, another cession Treaty (10 Stat. 1165) was negotiated which provided separate reservations for the Chippewa Bands. Article I of that treaty provided:

> And the same Indians do further fully and *entirely relinquish* and convey to the United States any and *all right, title or interest*, of whatsoever nature the same may be which they may now have in, and to, *any other lands* in the Territory of Minnesota or elsewhere.

App. 502, emphasis added.

The State of Minnesota was created in 1858. Among the first laws adopted by the new State were conservation laws (App. 569 and 573). They have generally been applied to all citizens, including members of these Bands, when off reservation.

United States officials have confirmed this authority of the State and the construction of the events summarized that the privileges were *revoked*. For notable example, President Franklin Roosevelt[4] responded in 1938 to a specific Chippewa claim that special off-reservation fishing and hunting rights had been preserved by treaty:

> [T]he hunting, fishing, and gathering privileges guaranteed by the 1837 and 1842 Treaties had been *revoked* by the 1850 executive order. . . .

---

[4] President Roosevelt's administration was notably sympathetic to Indians. These Bands are organized under legislation sponsored by this administration.

> the Indians . . . now have no greater right to hunt or fish on the ceded area . . . than do other citizens of the State. . . . (and) are amenable to the State game laws. . . .

Letter from President Franklin Roosevelt to Bad River Band (March 1, 1938), App. 575, emphasis added.

Procedural Background.

The case was commenced in 1990 by the filing of a complaint by the Mille Lacs Band against the State and its conservation officials. This was nearly a century and a half after President Taylor's 1850 Order of revocation. The Mille Lacs sought a declaration that treaty hunting and fishing "rights" continued and injunctive relief to enforce.

These Minnesota counties in the area affected applied to intervene, citing particularly impacts on public land values and county law enforcement. That intervention was denied by the district court. (Order of Judge Diane E. Murphy, 140 F.R.D. 390). On appeal to the Court of Appeals, the intervention was ordered (*Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993)). The United States was allowed to intervene in support of that Band in 1994. The case was bifurcated, with Phase II to consider "resource allocation issues . . . and the validity of particular measures to regulate. . . ." *Mille Lacs*, 861 F. Supp. 790, App. 212 at 217-218.

After trial in "Phase I," a decision was filed by the district court on August 24, 1994, Judge Diane Murphy presiding. *Id.* The district court held that the President's 1850 Order revoking the privilege was unlawful or ineffective and that the 1855 Treaty relinquishment did not

extinguish the hunting and fishing privileges. The case was set for a "Phase II" proceeding to allocate the resource and determine what state conservation laws could be applied to Bands.

Negotiations commenced (as directed) between the State and Bands for Management Plans and Protocols, whereby total harvests of fish and game would be jointly determined, the Bands would regulate their own harvests up to fifty percent, and the State would restrict others to accommodate the Bands' take.

As the Phase II trial approached, six Wisconsin Bands of Chippewa, descendant from other Bands signatory to the 1837 Treaty, were allowed to intervene, asserting claims in this area of Minnesota. Plaintiff Fond du Lac Band had commenced a separate action against state officials in 1992 with claims both in this area and in northern Minnesota (under a separate treaty). After the Mille Lacs Band was successful, the Fond Du Lac Band's 1837 treaty claim was consolidated with the *Mille Lacs* case. (The Counties were denied intervention in the Fond du Lac case.) All the Bands entered into the State-Band Management Plan/Protocol negotiations.

In Phase II, another district court judge (Michael J. Davis) ruled on Summary Judgment.[5] This Memorandum Opinion and Order, 952 F. Supp. 1362 (D. Minn. 1997), App. 74, approved the State-Band Management Plan/Protocols and granted judgment to all Bands.

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[5] The judge in Phase I, Diane Murphy, having become judge on the Eighth Circuit Court of Appeals.

The court held all Bands continued to enjoy rights under the 1837 Treaty which include fishing and hunting under their own regulation, not state law. The Management Plans require concomitant reduction of other citizens' hunting and fishing by the State. An injunction was entered solely against the State defendants ordering implementation of the Plan/Protocols and prohibiting enforcement of state law against Band members. 952 F. Supp. at 1398, App. 162-163. The Band harvests include commercial net fisheries on game fish and such hunting activities as night and light hunting deer over bait, both long illegal under state conservation laws. The Band harvests range from 50% of some game species and areas to a "phase-in" from a first year approximately 15% of fish in Mille Lacs Lake, increasing each year.

The court specifically declined to apply this Court's "moderate living" doctrine analysis (*Fishing Vessel Assn.*, 443 U.S. at 686) to reduce or allocate harvest of the Bands, all of which own and operate at least one casino. (Mille Lacs and Fond du Lac have two each.) The record included reports using figures from tribal audits showing each Band's casino(s) provided sufficient revenue to raise average income above the "moderate income" defined in federal statute. The district court held that before applying the "moderate living" doctrine to allocate, "the Bands must be given the opportunity to choose whether or not to continue with a way of life that is based on hunting, fishing and gathering." 952 F. Supp. at 1394, App. 150-151. The court also held that generally there was no treaty right of access to private lands. Band harvests are taken from public lands and waters and those private lands opened by statute. Since the resource share (up to

one-half), is calculated from total harvestable, this has the effect of concentrating harvest on public lands.

The district court has retained continuing jurisdiction over implementation of the case.

The appeals followed. The matter was briefed on an accelerated schedule. On August 26, 1997, the Circuit Panel (Judge McMillian, Senior Judges Lay and John Gibson) rendered an opinion affirming in all respects the district court, App. 1. The Circuit applied the "clearly erroneous" standard, holding the President's Order of revocation invalid and the 1855 relinquishment ineffective to extinguish hunting and fishing privileges. Though acknowledging the order approved "in effect an allocation of resources between treaty and nontreaty harvesters," the court concluded it "would have no occasion to consider the moderate living doctrine." Petitions for Rehearing En Banc were denied on November 17, 1997 by Order with two judges (Judges Wollman and Loken) voting to grant, App. 482.

REASONS FOR GRANTING THE WRIT

The President of the United States has constitutional Article II powers as well as Congressional-delegated power to issue Executive Orders which this Court has consistently held are not subject to court review. President Taylor's Executive Order of 1850 expressly *revoking* the temporary "privilege during the pleasure of the President" is such an Order. The Order is within *two* of the President's constitutional powers under U.S. Const. art. II

to make treaties with Senate consent *and* to act as commander in chief to implement them (since Indian affairs were then army matters).

This Court has repeatedly and recently held such actions of the President are unreviewable by courts. The Circuit Court decision failed to cite or discuss the recent Supreme Court decisions.

This Court has also held that language in a later treaty relinquishing "all right, title and interest" *extinguishes* all Indian claims, including hunting and fishing rights. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). The Panel failed to apply this precedent (which reversed a decision of the Ninth Circuit which had held that hunting and fishing rights survived such language of relinquishment).

The resultant problematic management of Minnesota's hunting and fishing resources is of exceptional public importance and raises serious constitutional issues. State conservation law may not be enforced with respect to Band members off reservation.[6] By court order, these state laws must be adjusted and enforced to curtail harvests by all other citizens to accommodate up to a "presumptive fifty percent harvest" for Bands already wealthy as a result of casino gambling. Reports of State and County experts so concluding using audit figures produced by the Bands are reprinted in Counties Appendix in the Circuit Court, pp. 001-122. If revenues from the casinos operated by each Band are considered, each has already exceeded the "livelihood, that is to say, moderate

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[6] On public and some private lands.

living" this Court held to be the treaty entitlement. *Fishing Vessel,* 443 U.S. at 686.

I. The Eighth Circuit Decision Conflicts In Principle With This Court's Precedents That Such an Order of the President Is Not Subject to Court Challenge.

The nonjusticability of "political" decisions by the President, based on constitutional separation of powers doctrine, had been confirmed by this Court the year before President Taylor's 1850 Order in *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849). This Court again confirmed that courts did not have jurisdiction to review such actions of the President a decade after this case should have been brought. *Mississippi v. Johnson,* 4 Wall. 475 (1867). Accordingly, at the time of the action – and for another hundred and forty years – the action of the President was unchallenged.

In 1962, the seminal case of *Baker v. Carr,* 369 U.S. 186, 217 (1962), established a three-part inquiry to determine justiciability. The President's authority to execute the Order of 1850 surely meets each test element – especially with a challenge proposed 140 years later.

First, Indian treaties, and their implementation, were constitutionally committed to the President both by the treaty power *and* as commander in chief (Art. II, § 2). Second, the particular political expertise to balance the interests of the Indians and of the rest of the Nation including settlers is Presidential (and impossible to recreate over a century later). One hundred forty years history of actions of the State and all its citizens in reliance counsel against judicial intervention now to

remake that history. What this Court has said of acts of Congress may be said of the President:

> Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently . . . we cannot remake history." 420 U.S., at 449.

South Dakota v. Yankton Sioux, 66 U.S.L.W. 4092, 4100 (January 26, 1998), quoting and citing *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 449 (1975).

In the only comparable attempt to bring a judicial challenge against a President who terminated treaty provisions (with a foreign nation), this Court held federal courts do not have jurisdiction to review such actions of the President of the United States. (*Goldwater v. Carter*, 444 U.S. 996 (1979), granting certiorari and directing lower court to dismiss complaint.)

In that case, the Court of Appeals for District of Columbia had first reviewed, and then upheld, the President's action to terminate treaty provisions. The court analysis in the *Goldwater* case is directly applicable to this case:

> Finally, and of central significance, the treaty here at issue contains a termination clause. . . .
>
> . . . the President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of notice of termination.

Carter v. Goldwater, 617 F.2d 697 at 708 (D.C. Cir. 1979).

Here, the Senate consented to a treaty granting a temporary[7] privilege which expressly provided that it continued only *"during the pleasure of the President."* The President's action was its revocation.

In *Goldwater*, this Court granted certiorari and ordered the case dismissed. Four Justices joined a statement that the case was not even justiciable:

> Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed.

Goldwater v. Carter, 444 U.S. 996, 1006 (1979). This case, of course, deals with a domestic Indian treaty, but the conclusion should be the same: political questions resolved a century and half before are non-justiciable.

A more recent decision of this Court, *Dalton v. Specter*, 511 U.S. 462 (1994), is also closely analogous. The language of the Base Closure Act recognized nearly absolute Presidential discretion by providing that the President was to receive a report of the Commission and decide "whether to approve or disapprove." Here, the 1837 Treaty privilege continued only "during the pleasure of the President," and after receiving the Commissioner of Indian Affairs Report proposing revocation, the President decided to issue the 1850 Order which unequivocally revoked that privilege. The language used has the same meaning – if articulated in 19th Century terms. That

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[7] "Temporary" is President Taylor's characterization.

the President alone would decide what was understood – and agreed to in the treaty – by both the Indians and the Senate in the Treaty.

This Court in *Dalton* further noted "the 1990 Act does not at all limit the President's discretion in approving or disapproving. . . . " *Dalton*, 511 U.S. at 476. This characterization equally applies to the 1837 Treaty language "during the pleasure of the President," which "does not at all limit the President's discretion. . . . " *Id.*

The separation of powers argument is also based in respect for the constitutional role of the President. Here, the President's authority was itself founded in *two* constitutional powers: The Art. II, § 2 power to make treaties *and* his separate Art. II § 2 role as commander in chief (since Indian affairs during this period were administered through the Army). Explicit statutory recognition of the President's authority was both in the Treaty itself *and* in the general delegation to the President of authority over Indian affairs at the time. Act of June 30, 1834, 4 Stat. 735 (1834) (later codified as 25 U.S.C. § 9 (1983)). .

In conflict with the principle stated in *Dalton*, the Circuit Court upheld the district court's blithe blanket determination that court review of a Presidential Order was appropriate:

> [J]udicial review of the validity of a presidential order is appropriate where necessary to resolve a case within the court's jurisdiction.

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 828 (D. Minn. 1994) (rejecting Counties' arguments).

The Circuit upheld this analysis in a *footnote* (fn. 20) without discussion of either *Goldwater* or *Dalton* though both had been cited and argued by the Counties.

In *Dalton*, this Court stated the conflicting principle and rebuffed such assertion of judicial authority to review and reverse acts of the President:

> But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.
>
> . . .
>
> How the President chooses to exercise the discretion Congress has granted him is not a matter for our review. . . .
>
> . . .
>
> . . . The claim that the President exceeded his authority under the 1990 Act is not a constitutional claim, but a statutory one. Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.

Dalton, 511 U.S. at 474, 476-77.

II. The Circuit Decision Conflicts With This Court's Decision that a Treaty Relinquishing "All Interests . . . In or To Lands" Extinguishes Hunting and Fishing Rights.

The later treaty of 1855, which gave the Mille Lacs their reservation, also provided a final express extinguishment of any claim of remaining rights off reservation. The Circuit holding to the contrary conflicts with the

decision in *Oregon v. Klamath*, 473 U.S. 753. It also conflicts with a decision of the same Circuit in *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 905 (1980)), which the Panel, in a glaring omission, did not even cite or attempt to distinguish.[8]

In the *Klamath* cases, the language was virtually identical to that used in the 1855 Chippewa Treaty. The Ninth Circuit had held that Klamath hunting and fishing rights continued to exist since not expressly mentioned and terminated. *Klamath Indian Tribe v. Oregon Dept. of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984). The Eighth Circuit Court had reached the opposite conclusion after considering the nearly identical language in *Red Lake*, 614 F.2d 1161. In *Red Lake*, District Court Chief Judge Devitt had based his decision on cession analysis of this Court:

> Two recent U.S. Supreme Court cases have construed Indian cession agreements and enactments with language nearly identical to that quoted above (citing). These cases make clear that "all right, title, and interest" language is "precisely suited" for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands.

United States v. Minnesota, 466 F. Supp. 1382, 1385 (D. Minn. 1979). (*See, also, Yankton Sioux, supra*, at 4096.)

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[8] This omission is especially mystifying where the district court in *Red Lake* expressly cited the Mille Lacs Band as one which "would not retain special hunting and fishing rights but instead would be subject to state gaming laws the same as non-Indians." *United States v. Minnesota* (later *Red Lake*), at 1387.

This Court granted certiorari in the Ninth Circuit's *Klamath* case (citing *Red Lake* as the conflict). The stated issue by this Court in *Klamath* was "whether a special right [to hunt and fish], nonexclusive but free of state regulation, was intended to survive in the face of the language . . . ceding 'all . . . right . . . in and to' the ceded lands." 473 U.S. at 765. This Court held that a cession of all interests as a matter of law extinguishes treaty hunting and fishing rights tied to the land, even if there is no express mention of those rights. *Klamath*, n. 23, p. 773.

This Court's holding in *Klamath* also restates the controlling principle that "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal', clearly runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774. (*Yankton Sioux*, 66 U.S.L.W. at 4096.)

The Circuit Court has disregarded that principle and reached a conflicting decision, by characterizing the *Klamath* rights as referring to "*exclusive* and *on-reservation* rights" as contrasted with these "*non-exclusive* and *off-reservation* rights." 124 F.3d at 921, App. 39, emphasis in opinion. This is ironic, indeed. On-reservation rights are always held to be the more sacrosanct, involving the homes of the tribes, their sanctuaries under the press of encroaching civilization or settlement.

III. The Circuit Holding Conflicts with the Interpretation of the President and of the Federal Agency Charged with Implementation of Indian Policy

This Court has recently reiterated the need to "take note of the contemporary historical context and subsequent congressional and administrative references. . . ." *Yankton Sioux, supra,* at 4098.

The most important such evidence, of course, is the very language of the President's 1850 Order. President Taylor referred to the privilege as "temporary" and expressly revoked it. This Order, along with the recommendation of the Commissioner of Indian Affairs and of the Territorial Governor which preceded revocation, are probative of the official understanding at the time. As the "contemporaneous view of the Executive Officer responsible for administering the statute," President Taylor's interpretation is "entitled to very great respect." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 254 (1985). *Accord Watt v. Alaska,* 451 U.S. 259, 272-273 (1981). (*See, also, Yankton Sioux, supra,* at 4099, quoting *Rosebud Sioux v. Kniep,* 430 U.S. 584 (1977) at 602, relying on a Presidential Proclamation as "an unambiguous, contemporaneous statement by the Nation's Chief Executive, of a perceived disestablishment.")

The historical understanding that no special privilege remained after the Order of 1850 may also be proven by considering official representations made by the Executive officers, especially the Commissioner of Indian Affairs, to the Indians and others over the intervening century.

In 1889, Congress adopted the Nelson Act, 25 Stat. 642 (1889) and directed settlement of Chippewa claims, even involving the reservations. In the course of the negotiations, the question was specifically asked by the Mille Lacs chief as to that Band's hunting privileges:

> Another thing – about the wild animals. If an Indian wishes to go outside the reservation to hunt deer, will he be allowed to do so in the hunting seasons?" Rice replied that:
>
> in regard to hunting for deer, that is a matter for the Legislature of the State to determine. You can hunt deer in any event, whenever you find them during the season set apart for hunting; and wherever the white man may hunt your young men will have the same right to do so.

Mille Lacs, 861 F. Supp. at 820., App. 297.

As the historical events faded in memories, periodically inquiries were made about the treaties – and Orders – most usually to the Commissioner of Indian Affairs (COIA). These were meticulously researched from the archives and summarized by expert historian. (L.A., Vol. 25.) They were consistent in reflecting the understanding that the President had properly revoked the privilege. Examples of the most important of these included those from the Commissioner of Indian Affairs, since this was the administrative agency with direct authority over the subject area.

In 1891, the Commissioner of Indian Affairs responded to Chippewa inquiry concluding state laws "apply with like force to the Indians."

In 1926, another COIA responding to a Chippewa inquiry stated that no special rights remained under the 1837 Treaty and concluded it was necessary to comply with state law on ceded lands "in view of the modified provisions of the treaty." (Quoted and cited 861 F. Supp. 784, 821 (D. Minn. 1994). App. 299-300.)

In 1929, the Assistant Commissioner responded there was "no treaty . . . whereof . . . the Chippewas . . . of . . . Minnesota have the right to hunt or fish on land ceded . . . without observing state game laws." Newell at L.A., Vol. 25, pp. 7944, 7963.

The same year, the COIA also concluded Indians were subject to state game laws. (*Id.* at Vol. 25, p. 8001.)

In 1934, the COIA informed a Mille Lacs that his arrest for hunting out-of-season off-reservation was valid:

> [T]he state game laws would apply and you would be punishable under the state game laws for killing deer on the land out of season.

Letter from Commissioner of Indian Affairs to tribal member (April 30, 1934), also cited at 861 F. Supp. at 821, App. 300.

In 1938, the Interior Solicitor in a letter to the Attorney General articulated the same conclusion (after quoting the Order of 1850):

> It follows, therefore, that as to the area ceded by the treaties of July 29, 1837, and October 4, 1842, the Indians have no greater right to hunt or fish therein than do the other citizens of the state; that is, the Indians are amenable to the

> game laws of the state while hunting or fishing within the areas ceded by those treaties.

Letter from Assistant Solicitor of Interior Oscar L. Chapman to Attorney General (January 26, 1938), L.A., Vol. 25, p. 8005.

A letter from the Assistant COIA to a member of Congress also quoted the 1850 Order and concluded:

> As a result of this Executive Order the members of the Lake Superior band of Chippewa Indians have only the right to engage in those activities on the ceded lands in common with other citizens of the State of Wisconsin and in accordance with the laws of that State.

Letter from Assistant Commissioner to House of Representatives (August 23, 1945). S.A.A. 314.

Coming from the federal agency charged with overseeing all Indian affairs, 25 U.S.C. § 2 (1983) – these interpretations are entitled to "considerable deference." *Andrus v. Idaho*, 445 U.S. at 729. *Accord National R.R. Passenger Corp. v. Boston & Main Corp.*, 503 U.S. 407, 417 (1992).

The Circuit not only declined to accord the Interior Department's interpretation any deference, but it completely ignored it, even though it was argued by the Counties below.

It is extremely significant that a later President of the United States, Franklin Roosevelt, reached the same conclusion, surely acting with advice and research of responsible officials. President Roosevelt specifically noted the privilege had been revoked by the 1850 Order.

> The Indians enjoyed these special hunting and fishing privileges until President Taylor issued the following order under date of February 6, 1850:
>
> [quoting order]
>
> . . . the special hunting and fishing privileges temporarily reserved to the Chippewa Indians . . . were revoked by order of the President, the Indians . . . now have no greater right to hunt or fish on the ceded area . . . than do other citizens of the State.

Letter of March 1, 1938, from President Franklin Roosevelt to Bad River Band. App. 575.

The direct conflict between the Circuit and these Executive interpretations provides an alternative, independently compelling reason to grant the writ. *See Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974) ("We granted certiorari because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary [of DOI]"); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (certiorari granted because lower court decisions "upset twenty-five years of important War Department rulings and practices"). *See, also, Williams v. Lee*, 358 U.S. 217, 218 (1959) (certiorari granted because lower court decision "was a doubtful determination of the important question of state power over Indian affairs").

IV. This Circuit Panel Applied the Wrong Standard of Review In Conflict with Decisions of this Court, Other Circuits, and Other Panels of the Eighth Circuit.

The standard of review relied on by the Circuit both when invalidating the President's 1850 Order revoking the privilege *and* when disregarding the effect of the 1855 Treaty was the same – and the wrong – standard:

> [W]e cannot conclude that the finding that the Bands did not consent to removal is *clearly erroneous*. . . .
>
> . . .
>
> The district court's factual findings regarding the intention of the parties to the 1855 Treaty are well supported, and we cannot conclude they are *clearly erroneous*.

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 917 and 921 (8th Cir. 1997), emphasis added.[9]

This conflicts with the (correct) standard applied in other circuits. In 1990, the Tenth Circuit described at length the correct standard and explained the reasons for applying the *de novo* standard of review:

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[9] The district court, Judge Murphy, based her rulings on factual findings of Chippewa intent or understanding, e.g.:

> "The court *finds* that the Chippewa did not intend to give up their 1837 treaty privilege and they did not understand the 1855 treaty to have that effect."

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 799 (D. Minn. 1994) (Emphasis added.)

> The Supreme Court has issued a number of pronouncements to guide lower court interpretations of statutes and EOs [Executive Orders] affecting the status of Indian reservations. . . . In the above cases the Supreme Court has applied without comment a *de novo* standard of review in determining congressional intent . . . . The ascertainment of congressional intent is a matter of statutory construction, which typically involves a *de novo* review. To the extent that statutory construction turns on a historical record, however, it involves a mixed question of law and fact. Where a mixed question "primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986). Such is the case here, where key district court legal conclusions, e.g., the need for explicit language mentioning boundary reduction or evidence of cession and compensation, "rest on an erroneous view of the law." *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789, 72 L. Ed. 2d 66 (1982).

Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1383-1394 (10th Cir. 1990), *cert. denied* 498 U.S. 1012 (1990). (Footnote omitted.)

In a prior decision, the Eighth Circuit (a different panel) cited the Ninth Circuit and noted that the appropriate standard of review is *de novo* not the "clearly erroneous" standard adopted by this Panel.

> Mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewable de novo. *United States v. McConney*, 728 F.2d 1195,

> 1199-1204 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984). Because our decision is predominantly one of determining whether the established facts fall within the relevant legal definition, albeit a constitutional definition, we apply a de novo standard of review. *Id.* at 1201-03.

Falls v. Nesbitt, 966 F.2d 375, 377 (8th Cir. 1992).

The Ninth Circuit has repeatedly held that the meaning of treaty language or Executive Orders are "ultimately a question of law reviewed *de novo*." *United States v. Washington*, 969 F.2d 752, 756 (9th Cir. 1992) (as restated as recently as last month in *United States v. Washington*, No. 96-35014, slip op. at 807 (9th Cir. Jan. 28, 1998)).

The importance of the standard applied cannot be overstated. *Klamath* would have been *differently* decided since the district court made the same kind of findings as here. This Court's recent review in *Yankton Sioux, supra*, reflects the same *de novo* review standard.

V. The Panel's Opinion Presents Issues of "Grave Constitutional Dimension" and "Exceptional Public Importance."

The Circuit decision affirmed the resurrection of a treaty privilege long revoked or extinguished. To implement this, it has approved a complicated scheme for management and conservation of Minnesota's natural resources under the continuing jurisdiction of the federal district court to supervise overlapping State and Band regulations. (The latter from eight Bands from two States.) The system approved raises serious issues.

The court's decision carves out an area of 13+ million acres of Minnesota in which state conservation law is displaced as to eight separate Bands. On *public* lands and waters, other citizens must sit by and watch Band hunting and fishing take up to 50% of the harvest during closed seasons (and using unlawful methods), with state license and taxes paying the costs to manage and conserve the resource.

Geographic magnitude alone is a compelling reason to grant the writ. In *Andrus v. Utah*, 446 U.S. 500, 506 (1980), for example, this Court explained that it granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands." The area involved in that case comprised some 571,000 acres, *id.* at 506, n. 6; a fraction of the millions of acres of land and waters involved in this case. *See, also, Andrus v. Idaho*, 445 U.S. 715, 722 (1980) (certiorari granted to resolve status of "some 2.4 million acres of desert land within Idaho"); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983) (certiorari granted "[i]n view of the importance of the case in the administration of . . . more than 33 million acres of land").

In addition to the geographic scope of this case, its jurisdictional significance makes it especially important. Federal, state and tribal authority over the lands and waters is dramatically changed. Within this area, eight bands, including six from hundreds of miles away (and from another state) authorize member hunting and fishing, taking up to half the natural resources and displacing state police power. The State and Counties are precluded

from exercising fundamental aspects of sovereignty and governmental power.

This poses significant regulatory problems. Fish and game are vital environmental and economic state resources, as well as part of the way of life of those who choose to live in these Counties. Minnesota sought statehood in significant part to be able to regulate these resources themselves and immediately enacted a comprehensive regulatory scheme of conservation. *See*, e.g., Chapters XIX and XLV, App. 569 and 573.

Here, the Bands and the court specifically approved commercial gillnet fisheries including many on small lakes, shining deer over bait and other similar practices up to a 50% harvest in each area (or lake). 952 F. Supp. at 1379, 1381, 1382, App. 112-125. All are violations of State Conservation laws.

> We have not previously found such absolute freedom from state regulation on nonreservation lands, even in the face of Indian cession agreements that expressly reserved a right to hunt or fish . . . .

Klamath, 473 U.S. 753 at 764 n.16. (numerous citations omitted)

A prime example of impacts are the opening of a commercial gillnet fishery on Mille Lacs Lake. This lake was formerly the premier sports fishery in Minnesota, providing not just an important element of the way of life of the Counties' residents but also substantial economic benefit to all citizens through tourism attracted to the Lake (including the Band which operates a casino on its shores).

The State's authority to regulate hunting and fishing in these vast areas of the State has been restricted and precluded altogether as to Indian Bands from *two* states when hunting and fishing under the Band codes. The State is forced to cut back its citizens' rights to hunt and fish to accommodate these priority claims. The State's regulatory and enforcement system is arguably thereby converted to enforcement of federal priorities in violation of the Tenth Amendment as construed by this Court in *Printz v. United States*, 117 S. Ct. 2365 (1997).

The Panel answer to this constitutional problem is that the State "voluntarily negotiated" the Plan/Protocols. 124 F.3d at 928-929, fn. 44, App. 58. However, this "negotiation" of the State's policy power was only done at the order of the court below. Such federal court jurisdiction to order a state to negotiate its sovereign interest was held violative of the XI Amendment by this Court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in context of a statute enacted by Congress which specifically *required* such negotiation. Here, there is no such statutory authority.

The resultant scheme also "allocates" the resource between citizens by requiring the State to set aside numbers of fish and game up to the number the Bands claim each year as their entitlement. Reductions in fishing seasons and game harvest for other citizens are ultimately required to be enforced by State regulations and officers.

The record established that for these Bands the total Band livelihood (average) already far exceeds the "moderate living" which this Court held was the (maximum)

treaty entitlement even where a permanent treaty right was involved. *Fishing Vessel*, 443 U.S. 659 (1979). As noted above, each Band operates at least one gambling casino – providing employment for any member desiring it, and millions of annual profits.

Finally, the decision forces conservation back into the Nineteenth Century by approving such practices as commercial net fisheries on game fish and night and light hunting and baiting practices rejected by Minnesota for years. Such conservation policy enacted by the State of Minnesota to protect its resources (and by most enlightened states and countries) are among the police powers of that state protected by the Constitution. The natural resources, and their shared use, enjoyment and conservation by all citizens, will suffer. That is a matter of exceptional public importance.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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